Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

(12)

No. 98-822

IN THE
Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICANS FOR THE ENVIRONMENT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amicus curiae Americans for the Environment is a national environmental organization that provides training and technical assistance to citizen leaders and elected officials working to protect the environment and public health.[1] Americans for the Environment has an interest in this case because it raises a fundamental challenge to the authority of Congress to include a citizen suit provision in the Clean Water Act to counteract the significant practical obstacles American citizens would otherwise encounter in advocating effective implementation of the Act.

SUMMARY OF ARGUMENT

This *amicus* brief presents three arguments. First, the Court has erred in its prior environmental standing cases by relying on a formalistic understanding of the American political system that ignores the significant barriers in the political process to expression of the broad public interest in environmental protection. The Court's environmental standing decisions over the last decade have narrowed the standing of citizens alleging injuries to their interests in a clean environment, while simultaneously expanding the standing of regulated businesses to challenge environmental regulation. These decisions are based, at least in part, on the mistaken idea that environmental and other majoritarian interests neither need nor deserve access to the courts because, simply by virtue of their numbers, their concerns will be addressed appropriately through the political process. In fact, as a result of free rider problems and the high costs of collective

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[1] Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, made a monetary contribution to this brief's preparation or submission. *See* Supreme Court Rule 37.

political action, effective expression of the broad public interest in environmental protection faces major obstacles in the American political system.

Second, the Court's recent environmental standing decisions are mistaken insofar as they rely on the idea that the courts should narrow citizen standing so that, in the words of Justice Scalia, congressional mandates will "get lost or misdirected" in the administrative implementation process. This idea contradicts the established principle that the judiciary should defer to Congress in the establishment of administrative policies. The citizen suit provision of the Clean Water Act represents a reasonable and entirely legitimate effort by Congress to promote effective implementation of the Act and to counteract the danger that the regulated community could successfully undermine the Act during the administrative implementation process. The courts have no authority to select those particular congressional policies which they believe should be "lost or misdirected."

Finally, contrary to the reasoning in the Court's recent environmental standing decisions, there is no basis in Article III for imposing special limitations on access to the federal courts for those seeking to protect their interests in environmental quality. This is especially true when, as in this case, Congress has passed legislation (which was approved by the President) specifically authorizing the bringing of the action, and the suit is against a private firm, not another branch of government. It is the decision of the court below, by refusing to enforce the Clean Water Act citizen suit provision as Congress intended, that threatens the separation of powers principle underlying Article III.

ARGUMENT

I. The Anti-Majoritarian Theory Underlying Modern Environmental Standing Decisions Ignores the Realities of the American Political Process.

Over the last decade, the Court has dramatically revised the law of standing to limit citizens' ability to sue in federal court to enforce federal environmental laws. This transformation has been based on the idea that those asserting a "majoritarian" interest in environmental protection neither require nor are entitled to regular access to the courts, whereas minority regulated interests need and should routinely be granted access to the courts to challenge the application of the environmental laws to them.

This novel theory of unequal standing is based on a mistaken empirical assumption about the operation of the American political process: that majoritarian interests generally are fairly recognized and accurately reflected in the political process. A large body of academic literature, common sense, and substantial empirical evidence demonstrate that this premise is simply wrong.

The basic rationale for the Court's recent environmental standing decisions is expressed most articulately by Justice Scalia, writing for the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). He explained the distinction between those interests which should be denied standing and those which should be granted standing in terms of whether the plaintiff is the object, or the intended beneficiary, of a law or regulation. Standing, he said,

> "depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will

> redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."

Id. at 561-62 (emphasis in original). While the quoted language is from the opinion of the Court, it is uncertain, in view of the separate concurring opinion by Justice Kennedy (joined by Justice Souter), *see* 504 U.S. at 579-81, whether a majority of the Court actually subscribed to this part of the majority opinion. *See also id.* at 579 (expressing agreement only with "the essential parts of the Court's analysis").

Justice (then Judge) Scalia developed this theory of the distinction between beneficiaries and objects of regulation in a 1983 article in the Suffolk University Law Review. *See The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881 (1983). Judge Scalia argued that standing doctrine needed to be revised, in his words, to "restrict[ ] courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, *and [to] exclud[e] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.*" *Id.* at 894 (emphasis added).

Judge Scalia contended that when a claim is brought by an individual who is "the very *object* of a law's requirement or prohibition," then the plaintiff will "always" have standing. *Id.* at 894 (emphasis in original). In that circumstance, the claim presents a "classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a 'generalized' one." *Id.* On the other hand, using language almost identical to that which appeared in *Lujan*, when the plaintiff "is complaining of an agency's unlawful *failure* to impose a requirement or

prohibition upon *someone else*," standing should be much more difficult to establish. *Id.* at 894 (emphasis in original). A legal challenge based on non-enforcement of the law asserts an essentially majoritarian interest, Judge Scalia reasoned, which should ordinarily be addressed, not by the courts, but by the majoritarian branches - the Congress or the Executive. A plaintiff with a majoritarian interest should be recognized as having standing only if he can demonstrate that non-enforcement of the law resulted in some special and distinctive harm to him. *Id.* at 894-95.

Over the last decade, the Court's major environmental standing decisions, all of which have been authored by Justice Scalia, have progressively implemented this anti-majoritarian theory of standing. In all of the cases involving claims by citizens or citizens groups alleging violations of the environmental laws, the Court has rejected the plaintiffs' standing and narrowed the circumstances in which citizens can sue to protect their environmental interests in the future. *See Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). On the other hand, consistent with the view that minority interests should have superior access to the courts, the Court in *Bennett v. Spear*, 520 U.S. 154 (1997), ruled that representatives of narrow economic interests had standing to challenge the implementation of federal environmental laws which allegedly harmed them.

One basic problem with this anti-majoritarian theory of standing is that it conflicts with the facts of the American political process. Contrary to the assumption that majoritarian interests get accurately expressed through the political process, citizens advocating majoritarian interests of many different kinds - consumers of retail products or services, citizens exposed to chronic health risks, or families seeking to

prevent environmental degradation in their communities — face severe obstacles to getting their views expressed in the political process. By contrast, both in absolute terms and in relation to their numbers, relatively narrow interests have significant advantages in advancing their agendas in the political process.

As academic commentators have long recognized, those who share an interest with a broad cross-section of society labor under two basic problems in seeking to advance their agenda through the political process: the so-called "free rider" problem and relatively high transaction costs. *See generally* Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (1965). The free rider problem has been concisely described by Professor Jonathan Macey:

> "By definition, the benefits from public spirited legislation fall on the public generally. As such, it is extremely unlikely that any individual will find it advantageous to devote privately the necessary resources to obtain such legislation. Those members of the public who spend nothing will have a free ride at the expense of those who invest in public-regarding legislation. Since any gain goes to the group as a whole, those who contribute nothing benefit just as much as those who have contributed a great deal. Thus it pays for each individual to do nothing and to hope that others will make an effort upon which he can 'free ride.'"

Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 231 n. 44 (1986). The free rider problem is particularly serious when the interest at issue is a broadly shared public good, such as clean water or clean air. Because the benefits of a public good accrue to everyone,

regardless of individual contribution, and because the benefits are diffuse and relatively small compared to the total effort required for their achievement, individuals will, if they are rational economic actors, free ride on the efforts of others rather than invest their own time and energy in political activity. E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, J.L. Econ. & Org. 313, 342 (1985).

By contrast, when the interest being advanced is not a public good, but is concentrated in a few firms or individuals sharing a specialized interest, and when the return to any individual from collective action is high relative to the costs of group activity, concerted political activity does not face a free-rider problem. Olson, at 33-36. Furthermore, in contrast with groups seeking to advance a public good, it is easier for narrow interest groups to police against free-riders, either by offering added incentives for involvement in the group or by sanctioning members of the interest group for non-participation. Macey, at 229. Finally, smaller size can support sentiments of solidarity which help overcome the free rider problem. David Knoke, ORGANIZING FOR COLLECTIVE ACTION 38-40 (1990).[2]

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[2] Some commentators have suggested that, in some cases, effective political organizers can counteract the free rider problem by offering "expressive" or "solidarity" incentives for collective political action. *See* Paul E. Johnson, *Interest Group Recruiting, Finding Members and Keeping Them*, in Alan J. Cogler & Burdett A. Loomis, INTEREST GROUP POLITICS 41 (1998). Even under this view, however, collective political action on behalf of public goods faces significant obstacles, "because people who have an interest in a collective good do not tend to be 'self-starters' who seek out and join groups. Instead, they must be sought out, pursued, enticed, and persuaded." *Id.* at 60. *See also* Kay L. Schlozman & John T. Tierney, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 128 (1986) ("most consumer and environmental groups enroll only a minuscule proportion of all who share their goals").

The second obstacle facing advocates of broadly shared interests is high transaction costs. Olson, at 48; *see also* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv.L.Rev. 713 (1985). Identifying like-minded individuals, communicating with the group, and motivating members to take concerted political action all require investments of time and money. The larger the group and the smaller the individual stake in the issue by each member, the higher the costs to achieve a given level of political effectiveness. Macey, at 229. For all the same reasons, the smaller the group, the lower the transaction costs to achieve the same level of effectiveness. Ackerman, at 727.

As a result of both of these obstacles, contrary to the formalistic premise of the Court's environmental standing decisions, citizens with broadly shared environmental interests will, everything else being equal, exercise far less political influence than their bare numbers would suggest. In practical terms, "the [diffuse] group is less likely to have a well-organized lobby to press its cause. It is also less likely to have the communications network necessary for the lobby's leaders credibly to threaten Congressman with the prospect of electoral retribution." Ackerman, at 727-28.

The available empirical evidence confirms that majoritarian interests face major obstacles in the political process. For example, in ORGANIZED INTERESTS AND AMERICAN DEMOCRACY, the most comprehensive study of special interest influence on American politics, Kay L. Schlozman and John T. Tierney conclude that:

> In general, organized interest politics tends to facilitate articulation of demands by the narrowly interested and well organized. By and large, the collectivities thus benefitted are well heeled; business, in particular, finds pressure politics a

> useful mechanism for pursuing political goals. Larger aggregates, especially the less advantaged and those seeking nondivisible public goods, such as clean air and lower taxes, fare rather less well through the agency of organized interest politics than they do elsewhere in the American political process.

Id. at 400. *See* also Macey, at 232 ("everyone who buys milk is harmed by mild price supports; but the small cohesive lobby of milk producers nonetheless is able to obtain these subsidies'); Roger G. Noll & Bruce M. Owen, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 41-53 (observing that consumers are generally less well represented than producers, and illustrating the point by discussing the successes of concentrated agricultural interests and the steel industry's ability to lobby for and "capture nearly all of any benefits that protectionist legislation provides the industry"). *See generally* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. Econ. & Org. 60 (1992) (observing that the collective action problem "is corroborated by the prevalence of pork barrel legislation that produces local benefits but a net social loss").[3]

In view of the substantial obstacles to organizing diffuse interests to support a particular political agenda, one might wonder how the American political system has produced any national environmental legislation at all. The most persuasive

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[3] The relative political weakness of environmental interests also is reflected in the levels of congressional campaign contributions. Total contributions by environmental political action committees in 1997-98 totaled $224,583, far less than the amounts contributed by energy and natural resource companies ($13,413,670), the agricultural sector ($14,095,910), chemical and related manufacturing ($1,517,781), and development companies ($8,300,622). *See* Center for Responsive Politics, *Political Action Committees* (1999) <www.opensecrets.org/pacs/>.

explanation is what Professor Daniel A. Farber has called a "Republican moment" in American political history. According to this view, "politics alternates between normal periods, in which public attention to an issue is weak, and extraordinary periods, in which the issue has high salience for the public." 8 J.L.Econ.& Org. at 68. The spate of national environment laws, particularly in the early 1970s, was, according to Farber, the product of one such "extraordinary" moment.

Assuming Professor Farber' s theory explains at least in part how some national environmental legislation got enacted,[4] it does not contradict the conclusion that — most of the time — the free rider and collective action problems mean that the political process is subject "to the demands of conventional interest groups." *Id*. Thus, acceptance of the idea that majoritarian environmental interests should ordinarily be addressed exclusively through the political process would mean that they frequently would not be addressed at all. Congress obviously hoped and believed that the citizen suit provision in the Clean Water Act would allow the public to play a strong role in vindicating the public commitments made in the Act. Contrary to the ungrounded anti-majoritarian theory of standing, limiting citizen standing to invoke the Act's citizen suit provision would simply reinforce the imbalance in the political process which already works to the disadvantage of members of the public interested in environmental protection.

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[4] *But Compare* E. Donald Elliott et al., at 326 (arguing that enactment of national clean air legislation helped serve interests of automobile and coal industries); Robert Zener, *The Federal Law of Water Pollution*, in FEDERAL ENVIRONMENTAL LAW 784-86 (1974) (arguing that enactment of Clean Water Act helped legalize pollution discharges).

II. The Clean Water Act Citizen Suit Provision Represents a Legitimate Congressional Response to the Danger of Undue Influence By the Regulated Community On the Implementation of Federal Environmental Law.

Then Judge Scalia, in his 1983 law review article, acknowledged that limiting citizen standing to sue to enforce environmental laws could encourage administrative nullification of federal environmental legislation. He viewed this possibility in an entirely positive light. He asked: "Does what I have to say [about standing] mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast halls of the federal bureaucracy?'" 17 Suffolk Univ. L.Rev, at 897. And he answered: "Of *course* it does - and a good thing, too," because there is no harm done when legislative mandates "get lost or misdirected." *Id*. (emphasis in original). Indeed, in his view, "[t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative." *Id*. In short, citizens should be denied standing to enforce the law to facilitate agency *disobedience* of congressional mandates and thereby promote administrative innovation.

In the Clean Water Act, Congress obviously reached a different judgment about the value of allowing federal legislative purposes to be "lost or misdirected in the vast halls of the federal bureaucracy." It is perhaps a fair question for *legislative* debate whether Congress should craft environmental legislation to tightly control administrative discretion or to promote flexibility and innovation. But the choice properly belongs to Congress and Congress' determination on this point is entitled to great deference. Certainly the courts have no authority to deploy standing

doctrine to select those particular policies which they believe should be "lost or misdirected."

The citizen suit provision in the Clean Water Act represents a reasonable and entirely legitimate effort by Congress to address the risk of "agency capture" by the regulated community, a well recognized, pervasive challenge to the fairness of the entire federal administrative process. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.") The risk of capture arises from the same basic problem affecting the legislative process, the imbalance of power between diffuse public interests and discrete firms and individuals subject to regulation. Indeed, if anything, the imbalance is greater in the administrative process than in the legislative process, given the so-called "revolving door" problem, the arcane technical and legal character of many administrative procedures, and the time-consuming nature of agency processes. *See id.* at 1713-14; Dion Casey, Note, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 Kansas J.Law & Pub.Pol. 142, 142-43 (1998) (cataloguing the explanations for agency capture).

Concerns about agency capture apply with full force in the environmental arena, where implementation efforts pit highly diffuse public interests against highly motivated polluters subject to potentially costly abatement obligations. *See* Schlozman & Tierney, at 400. *See also* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why 'Multiple Use' Failed*, 18 Harv. Envtl. L. Rev. 405, 407-08 (1994) (the concern that "well organized special interest

groups will exert a disproportionate influence on policy-making" is "particularly relevant in the case of public lands, where the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity interests").

The historical context and legislative history of the Clean Water Act citizen suit provision (and of the Clean Air Act citizen suit provision upon which the CWA provision was modeled) confirm that Congress adopted this provision out of concern about the danger of agency capture. *See* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970). *See also* Statement of Senator Bayh during Senate consideration of the conference committee report, October 4, 1992, *reprinted in*, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Vol. II. at 217 (Senate Public Works Comm. Print 1973) (describing citizens suit provisions as "a very important tool for keeping industry and government alike from letting standards and enforcement slip"). Leading academies have frequently observed that concerns about agency capture motivated Congress to adopt the citizen suit provisions. *See* R. Percival, Environmental Regulation: Law, Science, and Policy 181 (1996) ("When it enacted the environmental laws, Congress was aware of the extensive literature suggesting that regulatory agencies tend to become the captives of the regulated industry. To resist this agency capture model of the process, action-forcing provisions such as the citizen suits and provisions for judicial review were incorporated into the environmental statutes."); C. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L.Rev. 163, 192-93 (1992) ("[s]purred by... suspicion of agency 'capture,' Congress created a wide range of citizens' suits;" "[w]ith a number of devices, including the citizen suit, Congress hoped to overcome administrative laxity and unenthusiasm, and also to

counteract the relatively weak political influence of beneficiaries").

Because Congress adopted the Clean Water Act citizen suit provision to address the danger of agency capture and consequent skewing of administrative implementation of the Act, limiting the scope of the provision would directly frustrate Congress' purpose. Congress believed that citizen suits were necessary to correct a systematic imbalance of power in the administrative process. Judicial rulings limiting citizens' ability to rely upon citizen suit provisions nullify Congress' sensible and entirely permissible efforts to correct this imbalance.

Further, the idea that majoritarian interests in environmental protection should be accorded relatively *less* access to the courts than regulated entities not only leaves the imbalance of power in the administrative process unaddressed, it makes it worse. As Professor Farber has explained the point:

> "More restrictive standing rules are likely to have a differential impact. Industry groups can readily demonstrate economic harm, a traditional basis for standing. Thus, restricted standing rules will not affect their efforts to use the courts to rewrite legislative deals. When the original deal is in their favor, they will also be able to use the courts to enforce the deal. Because they lack the traditional economic injuries, environmental groups are likely to be more substantially affected by standing restrictions. Hence, they will be less able to enforce favorable legislative deals or to use the courts to rewrite deals in their favor. The net result is that restrictions on standing will tend to tug implementation away from the legislative deal toward industry interests."

8 J.L.Econ & Org. at 77. *See also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 Admin.L. Rev. 764 (1997) (observing that unequal standing doctrine will inevitably cause agencies to deal with the regulated community and the general public in a non-evenhanded fashion, based on which interest is most likely to sue the agency successfully if it makes a mistake).

III. Article III of the Constitution Mandates Judicial Respect for, Rather than Judicial Abrogation of, Citizen Suit Provisions.

It would create no fundamental problem under Article III of the Constitution for this Court to accept Congress' broad authority to confer standing on citizens to protect their environmental interests, even if those interests are broadly shared by other citizens. Indeed, it is the contrary view, that the judiciary may constrain Congress' authority to enact effective citizen suit provisions, which creates the genuine Article III problem in this case.

First, there is no Article III obstacle to repudiation of the anti-majoritarian rationale for the Court's recent environmental standing decisions, as the Court implicitly recognized last term in *Federal Election Commission v. Akins*, 118 S.Ct. 1777 (1998). In that case the Court upheld the standing of voters to challenge the FEC's classification of an organization under the federal election laws, rejecting the argument that plaintiffs lacked standing because they were asserting a "generalized grievance" that was "'shared in substantially equal measure by all or a large class of citizens.'" *Id.* at 1785, quoting from Brief for Petitioner. The Court acknowledge that some of its prior decisions included language suggesting that judicial relief might not be available "where large numbers of Americans suffer alike." *Id.* But, as the Court explained, these decisions actually

rested not only on the "generalized" nature of the injury, but also on the fact that the alleged injuries were "abstract or indefinite in nature." *Id.* at 1785 (distinguishing, among other decisions, the Court's decision in *Lujan*). So long as an injury is "concrete," even if it is widely shared, the Court ruled, there is no Article III standing problem. In reaching this conclusion the *Akins* Court refuted the idea implicit in *Lujan* that those asserting majoritarian interests lack standing simply because their interests are shared by many other citizens. *See Id.* at 1786 ("the fact that a political forum may be more readily available where an injury is widely shared... does not . . . automatically disqualify an interest for Article III purposes").

The conclusion that standing doctrine grants even-handed access to the courts for different types of interests properly focuses standing doctrine on the core *constitutional* issues underlying the doctrine. It comports with the established idea that the "case or controversy" limitation is intended to "help[ ] assure that courts will not 'pass upon . . . abstract, intellectual problems, but adjudicate 'concrete, living contest[s] between adversaries'. *Id.* at 1784, *quoting Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J. dissenting). It also comports with the understanding that standing doctrine prevents the courts from becoming entangled in essentially political issues assigned by the Constitution to the other branches of government.

Significantly, in this case, not only has Congress explicitly authorized (and the President approved) the filing of a Clean Water Act citizen suit, but this suit involves a claim against a private firm, not another branch of government. Thus, none of the primary indicia of a potential separation of powers problem are present in this case.

Second, Article III requirements are met in this case because plaintiffs satisfy the traditional three-part test for

standing, including a showing of an actual "injury," "causation," and "redressability." Congress believed that efforts to control water pollution had failed, and would continue to fail in the future, to the extent they relied upon independent showings that individual discharges caused an adverse impact on water quality. Thus, in 1972, Congress redefined the regulatory strategy to focus on technologically-defined effluent limitations. Consistent with that approach, Congress, in the citizen suit provision, defined the relevant "injury" as a "violation" of the applicable limitations. 33 U.S.C. 1365(a). *See Lujan*, 504 U.S. at 580 (Kennedy, J. concurring, joined by Souter, J.) (recognizing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before"); *Akins*, at 1784 ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"). At least when, as in this case, plaintiffs demonstrated that the illegal discharges were made into a waterbody they actually use, Article III injury and causation requirements are met. Furthermore, because the violations were ongoing at the time the suit was filed, the civil penalties payable to the U.S. Treasury serve a general as well as specific deterrent effect that meets the redressability requirement. *Compare Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998) (civil penalties do not satisfy redressability requirement where violations ceased prior to filing of citizen enforcement action). For the reasons discussed in detail in the briefs of the petitioners and other *amici*, it would be nonsensical to conclude that a firm violating the Clean Water Act at the time a suit is filed can escape liability for civil penalties, and that citizen plaintiffs can be entirely denied reimbursement of their attorneys' fees, simply because the

firm managed to come into compliance by the entry of final judgment.

Lastly, the ruling of the court below, rather than upholding the principle of separation of powers underlying Article III of the Constitution, actually infringes upon that principle by effectively invalidating the Clean Water Act citizen suit provision. Judicial invalidation of an act of Congress, whether this step is based on Article III or some other provision of the Constitution, involves the greatest possible judicial intrusion into the responsibilities of the legislative branch. This extraordinary judicial power can only be exercised sparingly and upon the clearest demonstration of the necessity for doing so. No such showing is possible with respect to the citizen suit provision of the Clean Water Act.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the U.S. Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,

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May 17, 1999